Keco Industries, Inc. *and* United Steelworkers of America, AFL–CIO–CLC. Cases 9–CA–27184 and 9–CA–28086

January 15, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On August 7, 1991, Administrative Law Judge Michael O. Miller issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modifed.[1]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Keco Industries, Inc., Florence, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

''(a) Remove from its files the written statement by Emanuel Viveiros describing his version of the November 8, 1990 incident allegedly involving Robert Morris and any reference to the unlawful reprimands of Robert Morris and notify Morris in writing that this has been done and that the reprimands will not be used against him in any way.''

2. Substitute the attached notice for that of the administrative law judge.

[1] We are modifying the recommended Order to require the expunction of employee Viveiros' written statement that was attached to the reprimand unlawfully issued to employee Robert Morris.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT maintain, announce, or enforce any rule prohibiting union solicitation or distribution that does not clearly inform employees that they may lawfully engage in those activities on their own, nonworking time.

WE WILL NOT warn or reprimand Robert Morris or any other employee for violating an invalid or disparately enforced no-solicitation and no-distribution rule or because they have engaged in protected union activities.

WE WILL NOT engage in the surveillance of employees' union activities or create the impression that their union activities are under surveillance.

WE WILL NOT change employees' terms and conditions of employment in retaliation against their union activities.

WE WILL in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL remove from our files the written statement by Emanuel Viveiros describing his version of the November 8, 1990 incident allegedly involving Robert Morris and any reference to the unlawful reprimands given to Robert Morris and notify him in writing that this has been done and that the reprimands will not be used against him in any way.

WE WILL, to the extent we have not already done so, restore the previous custom of permitting employees sufficient cleanup time prior to the end of their shift.

KECO INDUSTRIES, INC.

James R. Schwartz, Esq., for the General Counsel.
Paul R. Moran, Esq. (Cors & Bassett), of Cincinnati, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. These consolidated cases were tried before me in Cincinnati, Ohio, on April 18, 1991, based on charges filed by the United Steelworkers of America, AFL–CIO–CLC (the Union) on January 19 and December 5, 1990, as amended, and an order vacating and setting aside settlement agreement, reinstating charge and reopening case and a consolidated complaint, both of which were issued by the Acting Regional Director of Region 9 of the National Labor Relations Board (the Board) on January 10, 1991.

The consolidated complaint alleges that Keco Industries, Inc. (Respondent or the Employer) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by engaging in, and creating the impression of, surveillance of employee union activity, by prohibiting an employee from talking about the Union during ''working hours,'' by changing terms and conditions of employment and by issuing reprimands because of union or other protected concerted activities. Respondent's timely filed answer denied the substantive allegations of the complaint and asserted that the Board was barred from proceeding on the foregoing allegations by reason of the settlement agreement which the Acting Regional Director had improvidently set aside.

Based on my observation of the witnesses and their demeanor, the briefs filed by the General Counsel and the Respondent, and the entire record, I make the following

FINDINGS OF FACT

I. THE EMPLOYER'S BUSINESS AND THE UNION'S LABOR ORGANIZATION STATUS PRELIMINARY CONCLUSIONS OF LAW

Keco Industries, Inc. is engaged in the manufacture and sale of air-conditioning equipment at its facility in Florence, Kentucky. In the course and conduct of its business operations, it annually purchases and receives products, goods, and materials valued in excess of $50,000 at that facility directly from points located outside the State of Kentucky. The Respondent admits and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent admits, and I find and conclude that the United Steelworkers of America, AFL–CIO–CLC is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

A. *Background*

Respondent employs approximately 280 production employees at its Florence, Kentucky plant; they are not currently represented by any labor organization.

An organizational drive began in January 1990.[1] Among the employee leaders of this campaign was Robert Morris, a first-shift assembly electrician. The Union notified Respondent of Morris' role on the in-plant organizing committee and Respondent does not deny its knowledge of his union activity.

The Union filed an unfair labor practice charge on January 19. As amended, it alleged that Respondent promulgated and maintained an overly broad no-solicitation rule,[2] engaged in surveillance of employee union activities, created the impression of such surveillance, issued a verbal warning to Robert Morris (apparently for violation of the invalid no-solicitation rule), and changed terms and conditions of employment because of the union activity. On May 17, the parties entered into an informal settlement agreement, approved by the Regional Director, resolving the foregoing allegations. The notice required by the settlement remained posted for the required 60-day period, Respondent did not, thereafter, enforce the no-solicitation rule as written, and is presently in the process of issuing a rewritten rule.

On October 31, the Union filed a petition for representation election. The Employer agreed to a stipulated election and that election was held on December 20. The Union failed to receive the necessary majority of the valid votes cast, losing the election.

On December 4, prior to the election, the Union filed a new charge. It alleged that Respondent had prohibited employees from discussing the Union during working hours and had issued a formal reprimand to Morris for soliciting and threatening an employee during working hours. On January 10, 1991, the Acting Regional Director, having concluded that the issues raised by the new charge were substantially the same as those involved in Respondent's presettlement conduct, issued both an order vacating that settlement for noncompliance and the new complaint, alleging Respondent's pre and postsettlement conduct as violative of Sections 8(a)(1) and (3).

At the hearing before me, the General Counsel adduced evidence supporting all of the allegations of the consolidated complaint. Respondent contended that the settlement had been improvidently set aside inasmuch as the new conduct, even if proven, was de minimis and because the Regional Director had failed to provide Respondent with an opportunity to resolve the new allegations prior to vacating the settlement. Respondent offered no evidence on the allegations of the original complaint. Rather, it stipulated that if I found that the settlement was properly set aside, it would agree to reimposition of the remedy required in that settlement. General Counsel agreed to this procedure. Based on this stipulation, I find it unnecessary to discuss the evidence, found in the testimony of Robert Morris, with respect to the original allegations.

B. *The New Allegation*

1. Report and warning

On the morning of November 11, third-shift painter Emanuel Viveiros reported to his foreman, Fritz Kimbrew, that Morris had solicited him or attempted to give him union literature in his paint booth, while he was still on duty. Kimbrew reported this to the plant manager, Melio Cicchiani.

Cicchiani spoke with Viveiros and Viveiros gave him a written statement of what had happened. According to that statement:

> On November 8 at approximately 6:35 a.m. Bob Morris came into my booth while I was painting and was trying to get me to sign up for the Union. I told him I was not interested and he kept on talking to me about the Union. I asked him to leave because I was working. I feel that I was being [harassed] or [threatened] into joining the Union and that is why I am writing this letter.

On the following morning, with no additional investigation having been conducted, Morris was called into the office. He was confronted by Cicchiani, Personnel Manager Marylee

[1] All dates hereinafter are 1990 unless otherwise specified.

[2] The rule prohibited all distributions or solicitations on company premises without the permission of the plant manager.

Burgess, and his foreman, Larry Borgman. Burgess told him that the Employer had received a complaint, supported by a letter, alleging that Morris had threatened an employee in order to obtain his signature on a union authorization card. She reminded him that he was not allowed to talk about the Union during working hours. Morris denied that he had engaged in any such conduct and requested that she identify the employee who had complained or, at least, show him the letter without disclosing the name. She denied his requests and told him that this was a formal reprimand which would be placed in his personnel file, along with that letter.

The memorandum of reprimand relates Viveiros' complaint, essentially repeating what Viveiros had written. It went on to state:

> Emanuel was upset, feeling that his job was in jeopardy, because Bob was taking-up so much of his time while he was on the clock, trying to get a unit painted.
>
> Bob was reminded that he is not to solicit union membership on company time. I told Bob that the question comes to mind—how many times has this occurred where the employee didn't complain.

It contains no reference to Morris' denial.

Burgess testified that all she had with regard to this incident was Viveiros' word against that of Morris; she chose to credit Viveiros, testifying that he was a conscientious employee, unlikely to complain if the incident had not occurred. She did not claim that Morris was any less conscientious.

2. Credibility resolution

The instant situation is akin to that of a striker discharged for alleged strike misconduct. Where an employee is disciplined for having engaged in misconduct in the course of union activity, the employer's honest belief that the activity was unprotected is not a defense if, in fact, the misconduct did not occur. *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964); *Rubin Bros. Footwear*, 99 NLRB 610 (1952). See also *Huss & Schlieper Co.*, 194 NLRB 572, 577 (1971). In this case, I accept, arguendo, that the Employer honestly believed Viveiros' statement, notwithstanding the absence of any further investigation or any reason being given to disbelieve Morris.

Thus, the question is, did Morris solicit Viveiros on company time? To resolve this issue requires a closer look at the testimony.

Viveiros testified that he knew Morris by name, having had him identified at an earlier time by another painter, Herbert Johnson, and having seem him in the mobile home park where they both live. He testified that Morris came in to his paint booth at 6:35 a.m. on November 8, and showed him a piece of paper describing what he had earned in the absence of the Union and what he would have earned if the Union had been their representative. Morris allegedly then walked off with no further conversation taking place.

In a more detailed statement given to a Board agent about 5 weeks after the incident, Viveiros described the incident as occurring just outside, not inside, his paint booth, as he was removing a completed rack of painted products. Morris, he wrote in that affidavit, came up to him as he was closing the door of the booth behind himself and handed him a piece of paper. It showed what the employees had earned in the last 3 years; Morris allegedly stated that they were trying to get a union in so that they could make more money. He then walked away before Viveiros could reply. There was no attempt to have Viveiros sign anything and no persistent attempt to engage Viveiros in conversation. The incident took 10–15 seconds. It was witnessed, he said, by Herbert Johnson, from a distance of 4 or 5 feet. It was Johnson, he wrote, who had earlier pointed Morris out to him, identifying Morris as his cousin.

According to the affidavit, Viveiros reported the incident to his foreman, Kimbrew, stating that he feared for his job if seen engaging in union activity. That night, he claimed, he wrote out the statement on the incident which he volunteered to Cicchiani the following day.

In attempting to explain the differences between his testimony, his own statement and the affidavit given to the Board agent, Viveiros claimed that when he gave the affidavit, he had worked all night, had not slept, was worried about supporting his family and was attempting to avoid getting Morris in trouble. He admitted that he was similarly tired after working through the night when the incident occurred. He also admitted that Morris had not done anything to harass or threaten him; he wrote that he had felt threatened or harassed because he considered it to be harassment when someone repeatedly offers him papers in which he is not interested. Morris and others had proffered union literature to him on various occasions in the timeclock area.

When asked whether he was certain that it had been Morris who approached him on November 8, Viveiros replied affirmatively and volunteered that he even recalled how Morris had been dressed. He described Morris as wearing a medium green jacket, ''[a]nd his regular work uniform, grey pants, kind of light brown shirt.''

Morris completely and credibly denied having had any contact with Viveiros, or going to his paint booth, on the morning of November 8. He testified that he had ceased to solicit signatures on authorization cards when he turned the signed cards in to the Union prior to October 31, that he confined his distributions of union literature, both before and after that date, to nonworktime in the timeclock area, that he may have given or attempted to give Viveiros literature in that area, but that he did not know Viveiros, who worked on a different shift, until Viveiros appeared at the polls where Morris was the Union's observer. He was not the only employee distributing union literature; there were five or six others, some of whom matched Morris' general physical description.

Respondent's employees wear uniforms at work; the colors vary according to department. Morris' uniform consists of a light grey work shirt, like that Viveiros wears, and dark grey pants. The employees of other departments, the stockroom, tool crib and packing, wear brown shirts; Morris has never worn a brown shirt at work. He does have a green jacket but has seen other employees wearing similar jackets.

Johnson denied witnessing the alleged incident. He testified that, on a morning in early November, Viveiros told him ''that there was a fat guy over trying to give him union literature and that he was afraid it was going to jeopardize his job.'' Viveiros asked if Johnson knew who it was. Johnson assumed, from the description of an overweight male involved in union activity, which description fits Morris, that it was Morris and said so. Johnson told Viveiros that ''if he

was that scared, go see his foreman.'' Johnson also denied that he had previously identified Morris to Viveiros. Morris is his second cousin (his uncle's daughter's son); they are not closely acquainted and the relationship is not such that it would warrant discrediting Johnson.

Foreman Kimbrew testified that he spoke with Viveiros shortly after the incident. At that time, Viveiros told him that Morris had come into the paint booth, while Viveiros was painting, and attempted to give him a union authorization card to sign, in addition to other union literature. Viveiros, he said, claimed to have told Morris that he didn't want a card, that he was happy with his job, and felt threatened by Morris' presence.

All of the foregoing witnesses impressed me as being sincere in their convictions as to what did, or did not, occur, making this a somewhat difficult credibility resolution. On balance, however, I am satisfied that, as suggested by the General Counsel, Viveiros was mistaken in his initial identification of Morris and was, thereafter, unable or unwilling to admit that mistake. It is probable that Viveiros, in good faith but mistakenly, identified Morris on the basis of Johnson's supposition. He reported that identification because he feared for his job security if seen talking to a union proponent on working time.[3] This same sense of insecurity likely caused him to fear admitting and retracting that misidentification if, in fact, he ever realized that he had made a mistake.

In reaching this conclusion, I note Morris' credible denial and Johnson's similarly credible testimony indicating that Viveiros did not know the name of the individual who had approached him but asked Johnson who it might have been. Noted too are: Johnson's failure to corroborate Viveiros notwithstanding that Viveiros had specifically identified him in the Board affidavit as witnessing the incident; the existence of other employees who matched the description of overweight males active in the Union's behalf; and, the significant differences between Viveiros' testimony, what he told Kimbrew immediately after the incident, what he wrote in his own memorandum, and what he related in the Board affidavit.

I deem it especially significant that Viveiros volunteered that the person who approached him wore a brown uniform shirt. Morris' uniform shirt was grey; he never wore a brown shirt at work. No supervisor contradicted Morris' testimony in this regard. Considered also is Viveiros' admission that he is tired at the end of his shift (and therefore subject to confusion) and the fact that Viveiros and Burgess exaggerated a relatively innocent (albeit unprotected) incident into some form of threat or harassment.[4]

Accordingly, I find that Robert Morris did not engage in any unprotected union solicitation or distribution while either he, or the employee to whom the solicitation or distribution was allegedly made, were ''on-the-clock.''

[3] It was, therefore, not the person who spoke to him about the Union or the words uttered which Viveiros found threatening. Rather, it was his fear that Respondent might discharge him for union activity which created the impression of a threat. For him to have implied that Morris threatened or harassed him belies his claim that he did not want to get Morris in trouble.

[4] The reprimand further exaggerated the incident by suggesting that Morris had probably engaged in other incidents like this where no complaint had been made.

3. Disparate treatment

Both Morris and employee James Price testified, credibly and without contradiction, that other solicitations take place regularly, to the date of hearing, in the work areas and on worktime. They are not only known to management but are engaged in by an admitted supervisor, Darlene Riddle. These activities include weekly check pools, football pools, raffles, the distribution of catalogs for commercial products, and the sale of those products and others. According to Burgess, such activities are contrary to Repondent's present no-solicitation rule.

4. Invalid oral rule

Based on Morris' testimony, the complaint alleges that Burgess told Morris that he was not allowed to talk about the Union ''during working hours.'' Morris so testified and Burgess essentially admitted it, stating that Morris was told ''that he's not to solicit employees during working hours.''[5]

5. Conclusions and recommendations

Respondent contends, first, that this matter should not have gone forward because the Regional Office failed to notify it that there was a problem in compliance and offer it an opportunity to rectify that problem before issuing the order revoking approval of the settlement and the complaint. If that in fact is what occurred, it is unfortunate. This litigation could likely have been avoided if that protocol had been followed. However, it is not a reason to dismiss this complaint and refuse to approve withdrawal of the settlement. Respondent's umbrage at a purported breach of courtesy does not vitiate the public rights at stake. Moreover, even if Respondent had no opportunity to adjust the problem prior to issuance of complaint, that opportunity existed, and has continued to exist, to this day.

Respondent further contends that this matter is so minor, and its discipline of Morris so lenient, that neither revocation of the settlement agreement nor a complaint are warranted. I cannot agree.

The initial complaint asserted that Respondent promulgated and maintained a facially invalid no-solicitation/no-distribution rule. The settlement agreement provided that Respondent would not reprimand Morris or any other employee for violating that invalid rule. The evidence in support of the subsequent charge and complaint establish that Respondent disparately enforced whatever new rule it was then applying, applied the rule to Morris, who had not acted in violation of it, thereby repeating the same violation as originally found and settled, and since the settlement had still not promulgated and published a new and legally acceptable rule.

Moreover, the reprimand given Morris and placed in his personnel file, while mild, was not insignificant. It charged him with a violation of the Employer's no-solicitation and no-distribution rule and implied that he had harassed and threatened an employee. It also implied that he had done this on more than one occasion without there being an iota of evidence to support such an implication. While it did not expressly say so, its presence in his file could form the basis for subsequent, and more onerous, discipline. Its continued

[5] The reprimand states that Morris was ''reminded that he is not to solicit union membership on company time.''

existence would also serve to discourage other employees from engaging in protected activities for fear that they might be falsely accused of crossing the line into unprotected conduct.

Accordingly, I must reject Respondent's initial contentions regarding revocation of the settlement and issuance of complaint. Both actions, I find, were fully warranted by the evidence before the Acting Regional Director.

I further find that the evidence fully warrants the conclusion that Respondent issued this reprimand to Robert Morris because of his union activities, in violation of Section 8(a)(3) and (1) of the Act. I have credited his denials and found that he did not engage in an unprotected solicitation or distribution. He was, therefore, disciplined because his lawful union activities were known to the Employer.

I have further found that Respondent disparately enforced whatever rule it was applying. An employer cannot permit a wide range of solicitations and distributions, for sport or mercantile ends, in work areas and on work time, and lawfully prohibit employees from engaging in union and other protected activities. Thus, even if Morris had solicited Viveiros in a work area while Viveiros was working, the discipline would violate Section 8(a)(1). *K & M Electronics*, 283 NLRB 279 (1987).

Finally, I find that Respondent told Morris that he could not engage in union activities during working hours in violation of Section 8(a)(1). ''Working hours,'' as distinguished from ''working time,'' implies all of the time from the start of a shift until its completion, including break times and meal periods. Therefore, a prohibition of protected activity during ''working hours'' is presumptively invalid. *Our Way*, 268 NLRB 394 (1983).

CONCLUSIONS OF LAW

1. By promulgating and maintaining an overly broad no-solicitation and no-distribution rule, by engaging in the surveillance of employee union activities, by creating the impression of surveillance of employee union activities, and by prohibiting an employee from engaging in union activities during ''working hours,'' the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By Issuing verbal warnings to employee Robert Morris and by changing the terms and conditions of employment of the employees because of their union and other protected activities, the Respondent has violated Section 8(a)(3) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. As I have found that Respondent discriminated against its employees in violation of Section 8(a)(3), that action will include restoration of the previous custom of permitting employees sufficient cleanup time prior to the end of their shift, to the extent that this has not previously been restored, removal from its files of any references to the unlawful reprimands of Robert Morris, and notification to him in writing that this has been done and that the reprimands will not be used against him in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Keco Industries, Inc., Florence, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining or enforcing any rule prohibiting solicitation or distribution which does not clearly inform employees when they may lawfully engage in such activities.

(b) Warning or reprimanding Robert Morris or any other employee for violating an invalid or disparately enforced no-solicitation and no-distribution rule or because they have engaged in lawful protected union activities.

(c) Engaging in the surveillance of employees' union activities or creating the impression that employees' union activities are under surveillance.

(d) Changing the employees' terms and conditions of employment in retaliation for their union activities.

(e) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Remove from its files any reference to the unlawful reprimands of Robert Morris and notify him in writing that this has been done and that the reprimands will not be used against him in any way.

(b) Restore the previous custom of permitting employees sufficient cleanup time prior to the end of their shift.

(c) Post at its plant in Florence, Kentucky, copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''